FEDERAL ELECTION COMMISSION
Washington, DC 20463

DISSENTING OPINION IN ADVISORY OPINION 1996-4

of

CHAIRMAN LEE ANN ELLIOTT

In this matter the main issues center around the advisory opinion's response to the requestor's third question which is stated as follows: "If the candidate becomes ineligible for further matching payments under the provisions of 26 U.S.C. 9033(c)(1)(B), is there any way to assure the financial institution of the repayment from the delayed Treasury payments?"

It is clear that previously, when sufficient funds were present in the matching fund account, we consistently provided all certified funds prior to the date of ineligibility without reviewing a statement of net outstanding campaign obligations (NOCO Statement) from candidates. At that stage in the process we have never cared about a given candidate's debt status upon distribution of matching funds, but rather merely paid out all previously certified amounts. These funds were viewed as an entitlement and only after the candidate dropped out of the race were audits conducted to determine repayment determinations due to improperly spent funds.

The unique twist presented in this election cycle is that in some instances, due entirely to the matching fund shortfall, we may not be paying out previously certified funds to certain candidates until after the date of ineligibility ("DOI"). In those instances the majority of Commissioners have concluded in this advisory opinion that matching funds will only be dispensed in an amount up to a candidate's debt as reflected in a concurrently filed NOCO statement, even if that is less than the previous amount certified.

The eligibility requirements for payment of matching funds found in the statute at 26 U.S.C. 9033 do not mention outstanding debt as a requirement for payment. Rather, there are several references to certified matching funds as entitlements due candidates. Section 9034 of Title 26 is clear that the provisions of 26 U.S.C. 9033 constitute all the hurdles for entitlement to matching funds. Without question 26 U.S.C. 9036(a) states that "the Commission shall certify to the Secretary for payment to such candidate under section 9037 payment in full of amounts to which such candidate is entitled under section 9034," Part (b) of that same section ends with the following statement: "Finality of determinations. Initial certifications by the Commission under subsection (a), and all determinations made by it under this chapter, are final and conclusive, except to the extent that they are subject to examination and audit by the Commission under

section 9038 and judicial review under section 9041." In fact our own regulations refer to certified funds as those to which the candidate is "entitled." See 11 CFR 9036.2(c)(2) and (d).

Under any interpretation, the result of this Advisory Opinion is that presidential candidates who have otherwise become entitled to a previously certified amount of matching funds will receive less money overall than they are entitled to, merely because of the government shortfall and not as a result of any fault of their own. Furthermore, the various candidates as a result of this draft would inequitably receive different proportions of their overall budgets from public funds depending upon their relative debt loads on their respective dates of ineligibility.

In direct contradiction to the statute's mandate at 26 U.S.C. 9037 that "'the Secretary [of the Treasury] shall seek to achieve an equitable distribution of funds available," this advisory opinion results in inequitable treatment of candidates with early dates of ineligibility vis-...-vis candidates that go the distance beyond full funding of the matching fund. When viewed in comparison to candidates who succeed in surviving long into the primary process, less "successful" candidates that carefully watch their funds to avoid excessive debt are punished by this opinion. Those that most need money to survive will be the most short-changed on matching funds, and as a result may find it more difficult to secure the bridge loans for the full-amount of certified funds that they so desperately need. In contrast, those candidates with the best chance of lasting longer in the race will find it easier to obtain bridge loans because their matching funds will most likely be completely disbursed without review of any NOCO statement.

I do not believe that the majority opinion's recommendation for candidates to obtain a loan for the full amount of certified funds prior to the date of ineligibility necessarily protects them, or otherwise ensures them of full payment of their certified funds. Basic accounting principles teach you that while the loan itself may be reflected as a debt in any NOCO statement, unless the loan funds are completely spent they will be reflected as a countervailing asset in the hands of the candidate committee. Thus, only candidates stupid enough not to spend every dime and end up in debt will suffer under this advisory opinion's guidance and not receive full entitlement from the matching fund. Such encouragement to waste public funds cannot be in the best interest of the fund, the Commission or the country.

Another problem may manifest itself as a result of Commission review of NOCO statements prior to payout of previously certified funds. It would seem that under this advisory opinion's guidance the Commission begins an overly intrusive review of the campaigns expenditures prior to the ordinary Audit process. In the past candidates traditionally have been granted wide discretion by the Commission regarding the expenditure of funds toward what should be considered qualified campaign expenditures. Thus candidates spent certified matching dollars without Commission intrusion. Under the draft scenario the Commission would become the arbiter through NOCO submissions of what are qualified campaign expenditures before making fund payouts.

While I agree that 11 CFR 9036.4(c)(2) allows the Commission in instances of shortfall to revise previously certified matching fund amounts, I note that the regulation is merely permissive, not mandatory. The regulation clearly states "the Commission may revise the amount previously certified." Furthermore, when viewed in context, I believe such revisions to be limited

by the preceding paragraph to adjustments resulting from non-qualified campaign contributions submitted for matching. For these reasons this advisory opinion's use of the mandatory word "will" is dead wrong. The better course, given our discretion in the matter, is to provide all matching funds as certified as they become available and then make the traditional repayment determinations (as we are authorized by 26 U.S.C. 9036(b) and have always done before) through the audit process.

3/18/96